Spentonbush/Red Star Companies *and* Local 333, United Marine Division International Longshoremen's Association, AFL–CIO. Cases 2–CA–22970–2, 2–CA–23249, and 2–CA–23282

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On March 1, 1994, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed briefs in support of the judge's decision, the General Counsel filed a brief in opposition to the Respondent's exceptions, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings as modified,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. The judge found that tugboat captains and barge captains do not hire, transfer, suspend, promote, discharge, assign, reward, or discipline employees, or responsibly direct them or effectively recommend such action, or possess any other supervisory authority within the meaning of Section 2(11) of the Act. The Respondent contends in its exceptions, among other things, that the record ''is replete'' with examples of captains exercising disciplinary authority and that captains also assign and direct work. It is well settled that the burden of proof of supervisory status rests on the party alleging that such status exists. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982). As discussed below, we find that the Respondent failed to sustain its burden.

In some of the examples the Respondent cites, captains have fired or recommended the firing of personnel ''off a ship'' (i.e., transferred) for drinking or disappearing for days without notice. The Board has consistently held that authority to discharge that is limited to flagrant violation of common working conditions, such as being drunk, is insufficient to confer supervisory status. See *Loffland Bros. Co.*, 243 NLRB 74, 75 fn. 4 (1979), and cases cited there.

The other examples on which the Respondent relies fail to support the assertion that a captain exercised disciplinary authority. For example, the Respondent claims Captain Hoyt recommended that Mate Walter Donoway be removed from his vessel for incompetence. Contrary to the Respondent's contention, however, Hoyt stated that he did not fire Donoway, but merely reported to the front office that Donoway had caused the contamination of gasoline. He ''guess[ed]'' that the front office investigated the problem. He could not recall how long Donoway stayed on the boat after the incident.

The Respondent also claims Captain Mark Cassin recommended terminating Mate Charles Behrmann. General Manager Stanley Chelluck testified that after Cassin brought certain facts to his attention about Behrmann's shortcomings, Chelluck made further inquiries and ultimately decided to fire Behrmann, having determined for himself ''that he [Behrmann] wasn't worth suspending or disciplining in any other manner.'' Chelluck received input from the port captain and shoreside terminal personnel. The record does not show that the Respondent received a recommendation to fire Behrmann from any captain.

We do not believe either example evidences that the captains effectively recommended termination.[3]

In addition, as the judge found, Chelluck's testimony contradicts the Respondent's claim that captains possess supervisory authority. Chelluck admitted that before any action was taken with regard to certain terminations, an independent investigation was undertaken. With regard to instances of adverse actions, Chelluck conceded that he was unable to recall whether a captain's recommendation was linked to a later personnel decision. Chelluck conceded that if he believed the captain was wrong in wanting an individual discharged, he would not terminate the person. Indeed, Captain Daniel Blair testified that he complained to Chelluck that Mate Chris Rowerick did not belong on the boat and did not have the kind of experience needed. Chelluck disregarded Blair's complaint and Rowerick remained on the boat. Another captain also testified as to instances when his request to discharge was not followed.

We find that there is insufficient evidence to support a finding that captains have authority to discipline or recommend discipline.

Regarding the claim that captains assign and direct work, the Respondent points to evidence that the captains set their vessels' maintenance schedules (i.e., chipping, painting, and cleaning), assign the work to

[1] The Respondent's request for oral argument is denied because the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The judge inadvertently failed to make statutory jurisdictional findings. The jurisdictional allegations of the consolidated complaint are admitted. Thus, the Respondent admits that it has been at all times material to this proceeding an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] The Respondent also points to documents from personnel files, which contain notations to the effect that a captain disciplined, or effectively recommended discipline of, a crew member. As the judge observed, however, the brief notations are conclusory and otherwise unsupported by testimony or other evidence.

the crew, and inspect the work; direct the crew how to ''make up'' or attach the tug to the barge (i.e., which ropes, which side of the vessel, and what equipment are to be utilized); and direct a mate in loading and unloading operations (i.e., which compartments are to be filled, which valves opened and closed, and in which order).

The Board has held that possession of any one of the indicia specified in Section 2(11) is only sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment on behalf of management and not in a routine manner. See, e.g., *John N. Hansen Co.*, 293 NLRB 63, 64 (1989).

The judge found the painting and chipping work performed by the deckhands was routinely scheduled maintenance work and did not require any particular direction. Barge captains also performed painting and chipping work with the mate. According to a Respondent witness, painting and chipping assignments were to ''usually try to start at the top and work down. Get so much done a day.'' Established daily routines and custom dictated the performance of this routine function. We agree with the judge's finding that the assignment and direction of maintenance work is routine in nature.

With regard to the direction of personnel in ''making up'' to a barge, the record shows that the decisions were in the vast majority of cases predetermined and routine in nature and that the responsibilities were shared between the mate and the captain, depending on which one was on watch. In tying the barge to the tugboat, the deckhand handled the lines, a task requiring little or no guidance from the captain or mate. We agree with the judge that to the extent captains direct this work, the type of direction involved is not that of a supervisor but that exercised by a more experienced employee over one who is less skilled. *McAllister Bros.*, 278 NLRB 601, 614 (1986).

We find that the evidence on which the Respondent relies is insufficient to prove that captains exercise independent judgment in the assignment and direction of other employees' work.

Accordingly, we find that captains are not supervisors within the meaning of Section 2(11) and that the Respondent unlawfully withdrew recognition from the Union as the captains' representative in violation of Section 8(a)(5).[4]

2. The Respondent excepts to the judge's finding that it violated Section 8(a)(5) by insisting on changing the unit description. For the following reason, we agree with the judge's conclusion.

The Respondent does not dispute that it insisted throughout bargaining that tugboat captains and barge captains were supervisors and should be removed from the bargaining unit. The Union strenuously opposed the Respondent's proposal.

It is well settled that the alteration of the bargaining unit by the elimination of employee classifications is a permissive subject on which an employer may not lawfully insist on bargaining. See *Facet Enterprises*, 290 NLRB 152 (1988), enfd. 907 F.2d 963 (10th Cir. 1990). As explained in the previous section of this decision, we agree with the judge that captains are not supervisors. It therefore follows that the removal of captains from the unit is a permissive bargaining subject and the Respondent's continued insistence on their removal from the unit violated Section 8(a)(5).[5]

3. ''Under established Board law, an unfair labor practice strike is a strike precipitated in part by an employer's unfair labor practice.'' *Boyles Galvanizing Co.*, 239 NLRB 530 (1978). Here, the record clearly establishes that the Respondent's unlawful insistence on the removal of the captains from the bargaining unit was one of the causes of the Union's February 16, 1988 strike. For this reason, we affirm the judge's finding that the strike was an unfair labor practice strike from its inception.

The Respondent argues that the Union's ''pooled'' voting procedure was unlawful under *Paperworkers Local 620 (International Paper)*, 309 NLRB 44 (1992), and that therefore the strike itself was unprotected. The Respondent raises this argument for the first time in its reply brief to the Charging Party's brief. We therefore find it untimely raised. See *Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985), enfg. 272 NLRB 705 (1984); and *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990).

4. The Respondent excepts to the judge's finding that it refused to reinstate unfair labor practice strikers who unconditionally offered to return to work. We agree with the judge.

On September 2, 1988, employees engaged in an unfair labor practice strike offered, through the Union, to return to work ''under the terms and conditions that existed under the expired collective bargaining agreement.'' The Respondent, having implemented new terms, contends that the offer to return was conditioned on the Respondent's restoring the terms and conditions of the expired collective-bargaining agreement.

The judge found the employees' offer unconditional and rejected the Respondent's contention, finding that the Respondent had in essence unlawfully conditioned

[4] The judge found that the Respondent's withdrawal of recognition from the Union as representative of the captains also violated Sec. 8(a)(3) of the Act. We find it unnecessary to pass on the judge's finding, because it does not significantly affect the remedy in this case.

[5] In view of our finding that the Respondent violated the Act by insisting on removing captains from the unit, we find it unnecessary to pass on the judge's discussion of the Respondent's geographic scope proposal.

the reinstatement of the strikers on accepting the terms and conditions it had unlawfully imposed. We agree with the judge that the offer to return to work was unconditional. An employer's offer to reinstate unfair labor practice strikers based on terms and conditions that have been unlawfully imposed is not a valid offer. *White Oak Coal Co.*, 295 NLRB 567, 572 (1989); *PRC Recording Co.*, 280 NLRB 615 fn. 2 (1986), enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987).[6] We have found that the terms and conditions the Respondent implemented when the strike commenced were unlawfully imposed.

The remedy in the cases cited in the previous paragraph was to reinstate the employees at the terms and conditions in the expired contracts. Similarly, the Respondent in this case was required to return the strikers to the terms and conditions of employment existing under the expired contract. Because the Union's offer merely stated what the Respondent was legally obligated to do, we cannot agree with the Respondent that the offer was conditional. To hold otherwise would allow the Respondent to reinstate strikers at unlawfully set terms and conditions while tolling its backpay liability.[7]

The Respondent apparently believes that it is entitled to consider the new terms and conditions the status quo until the Board has determined whether the Respondent's changes were lawful. The Respondent is mistaken. The Board has long held that an employer acts at its peril in making unilateral changes in terms and conditions of employment. *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984).

Having refused to reinstate the strikers who were engaged in an unfair labor practice strike on their unconditional offer to return to work on September 2, 1988, the Respondent violated Section 8(a)(3) and (1) of the Act.

AMENDED REMEDY

We agree with the remedy the judge provided subject to the following modifications.

First, we will modify the judge's recommended Order to make clear that unit employees are to be made whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful unilateral changes in their terms and conditions of employment. Backpay will be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d. 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Second, the judge provided for payments to various trust funds with ''any interest thereon'' to be computed under *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We will leave to the compliance stage the determination of any additional amounts the Respondent owes to the funds to satisfy the make-whole remedy in accord with *Merryweather Optical*, supra at 1216 fn. 7.

Third, as part of the make-whole remedy for employees the Respondent should have reinstated after September 2, 1988, the judge ordered that the Respondent reimburse the Union for dues the Respondent did not deduct. The Respondent, however, was not obligated to deduct dues because the contract had expired in February 1988, and the obligation to deduct dues does not survive contract expiration. See, e.g., *Bethlehem Steel Co.*, 136 NLRB 1500, 1501, 1502 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963). We will delete this portion of the recommended Order.

Fourth, we will conform the reinstatement language of the judge's recommended Order to the standard reinstatement language he used in the remedy.

Finally, we will include an affirmative bargaining obligation in the Order, which the judge inadvertently omitted. ''For over 50 years, an affirmative bargaining order has been the standard Board remedy for an employer's unlawful refusal to bargain with a union which, as of the date of refusal, enjoys the status of a 9(a) collective-bargaining representative.'' *Williams Enterprises*, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995). Such a remedy restores the status quo existing prior to the Respondent's violation of the statute. The remedy ''does not involve any injustice to employees who may wish to substitute for the particu-

[6] In finding that the Union's offer on behalf of the strikers was unconditional and that the Respondent was obligated to reinstate the strikers, we do not rely on the judge's suggestion that the Respondent had constructively discharged the strikers.

[7] The Respondent's reliance on *McAllister Bros.*, 312 NLRB 1121, 1123 (1993), and *Industrial Electric Reels*, 310 NLRB 1069, 1086 (1993), is misplaced. Although the offers to return to work in those cases contained wording similar to that used by the Union here, the Board's conclusion in *McAllister Bros.* and *Industrial Electric Reels* that the offers were conditional was premised on the Board's findings that the respondents had lawfully imposed new terms and conditions of employment and were not obligated to reinstate the terms that existed at the time the strikes began. Here, as stated above, we have found that the terms and conditions of employment existing at the time of the Union's offer were unlawfully imposed and that the Respondent is obligated to reinstate the terms that existed at the time the strike began.

Similarly inapposite are cases cited by the Respondent holding invalid requests for reinstatement conditioned on the employer remedying the unfair labor practices that caused the strike. E.g., *Atlantic Daily World*, 192 NLRB 159 (1971); *Flambeau Plastics Corp.*, 172 NLRB 448, 449 (1968), review denied sub nom. *Industrial Workers Local 380 v. NLRB*, 411 F.2d 249 (7th Cir. 1969). We have found above that the strike was an unfair labor practice strike because it was caused in part by the Respondent's unlawful insistence on the removal of the captains from the bargaining unit. Nothing in the Union's September 2, 1988 letter, however, addressed this subject. The Union did not condition the strikers' offer to return to work on the Respondent's withdrawal of its proposal to change the bargaining unit. Rather, the Union simply insisted on what the employees were legally entitled to, i.e., the restoration of the terms and conditions that existed prior to the Respondent's unlawful unilateral changes.

lar union some other . . . arrangement'' because a bargaining order does not ''fix a permanent . . . relationship without regard to new situations that may develop.'' Id.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below, and orders that the Respondent, Spentonbush/Red Star Companies, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively with the Union, Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO, as the exclusive collective-bargaining representative of all the employees in the unit described in the 1985–1988 agreement between the Respondent and the Union, including captains and mates, by insisting on changing the description of the unit, by withdrawing recognition from the Union as the exclusive collective-bargaining representative of its captains, and by unilaterally changing the wages, hours of work, and other terms and conditions of the employees in the unit described in the 1985–1988 agreement.

(b) Failing to reinstate unfair labor practice strikers who applied unconditionally for reinstatement to their former positions of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore, maintain, and give full effect to the terms and conditions of the 1985–1988 agreement with the Union, rescinding all changes made on and since February 16, 1988, and make whole the unit employees for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, including making payments on their behalf to the trust funds in the 1985–1988 agreement, as provided in the judge's remedy as modified.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit, as described in the 1985–1988 collective-bargaining agreement, on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Offer each of the unfair labor practice strikers, who applied for reinstatement on September 2, 1988, immediate and full reinstatement to their former positions of employment or, if for lawful reasons those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights, privileges, and benefits previously enjoyed, displacing if necessary any employees hired as replacements for them.

(d) Make whole each of these employees for losses they incurred by reason of their not having been reinstated on September 2, 1988, with interest thereon computed as described in the remedy section of this decision and by making payments on their behalf to the trust funds provided for in the 1985–1988 agreement, as provided in the judge's remedy as modified.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(f) Post on each of its tugboats and barges and at its office in New York City, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain collectively with the Union, Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO, as the exclusive collective-bargaining representative of all the employees in the unit described in the 1985–1988 agreement we have with the Union, including captains and mates.

WE WILL NOT unilaterally change the description of that unit, or withdraw recognition from the Union as the exclusive collective-bargaining representative of captains or unilaterally change the wages, hours of

work, and other terms and conditions of employees in that unit.

WE WILL NOT fail or refuse to reinstate unfair labor practice strikers who apply unconditionally for reinstatement to their former positions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL restore, maintain, and give full effect to the terms and conditions of the 1985–1988 agreement with the Union, rescinding all changes made on or after February 16, 1988, and WE WILL make whole unit employees for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, including making payments to the trust funds in the 1985–1988 agreement on behalf of each of these employees.

WE WILL offer each of the unfair labor practice strikers, who applied for reinstatement on September 2, 1988, immediate and full reinstatement to their former positions or, if for lawful reasons those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, displacing if necessary any employees hired as replacements for them.

WE WILL make whole, with interest, each of these employees for losses they incurred by reason of their not having been reinstated on September 2, 1988, and WE WILL make payments to the trust funds in the 1985–1988 agreement, on behalf of each of these employees.

WE WILL bargain in good-faith with the Union as the exclusive collective-bargaining representative of the employees in the unit as described in our 1985–1988 collective-bargaining agreement with the Union.

SPENTONBUSH/RED STAR COMPANIES

Larry Singer, Esq. and *Nancy Reibstein, Esq.*, for the General Counsel.

Aaron Schindel, Esq. and *Donald B. Shanin, Esq. (Proskauer, Rose, Goetz & Mendelsohn)*, of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint in these cases alleges that Spentonbush/Red Star Companies (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The Respondent, in renewal contract negotiations with Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO (the Union) allegedly insisted on changing the geographic scope of the bargaining unit and on removing employees in certain job classifications from it. The Respondent is alleged to have then unilaterally implemented those changes and others. The complaint alleges further that the Respondent unlawfully withdrew recognition from the Union as the representative of employees in two of those classifications, that the unit employees struck in protest of all these unfair labor practices, that the Union later made an unconditional offer to return to work on behalf of about 170 striking employees, and that the Respondent failed and refused to reinstate these employees.

The Respondent, in its answer, denies those allegations and avers that Section 10(b) of the Act bars the General Counsel from proceeding as to one of those allegations.

I heard this case in New York City beginning in April 1991. The hearing was adjourned indefinitely then. It resumed in May 1992. In June 1992, it again was recessed indefinitely. By letter to the parties on June 1, 1993, the hearing was closed.[1]

On the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs and supplemental briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. COMMERCE—LABOR ORGANIZATION

The Respondent transports oil and gasoline and functions as an essential link in the transportation of freight and commodities in interstate commerce.

The Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, a New York corporation, is a wholly owned subsidiary of M. Amerada Hess Corp., a fully integrated oil company known as Hess Oil. The Respondent is comprised of a number of companies that are, essentially, divisions of the Respondent, all engaged in the transport of oil and gasoline by tugboats and barges.

The Union, for many years, represented a unit of all employees on those vessels, including captains and mates. The agreement that expired in 1979 covered the Respondent's crews performing work ''in New York and vicinity.'' In actuality that contract covered a much broader area. According to one the of General Counsel's witnesses, an issue arose in 1977–1978 as to how far from New York the contract would apply in view of the phrase, ''New York and vicinity.'' In the 1979 renewal contract negotiations that issue was discussed. The Union then engaged in a lengthy strike, seeking to define, with precision, the geographic area in which the unit employees worked. The end result of the strike was that ''language was hammered out that defined the geographic scope of the bargaining unit.'' The agreed-on language was incorporated into the 1979–1982 contract. It read:

> This Agreement applies only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters and self-propelled and non-self-propelled tank vessels owned or operated by the [Respondent], a subsidiary company, an affiliated company or a com-

[1] The letter is made part of the record as ALJ Exh. 1.

pany division in the Port of New York and vicinity and as provided below in this Agreement.

(a) The [Respondent], including any subsidiaries or affiliated companies, will continue to perform the work in the following areas through employees covered by this Agreement pursuant to the terms of this Agreement.

1. The Port of New York and vicinity, which is bounded as follows:

(a) on the south, the north end of Cape May, New Jersey.

(b) on the north, the upper navigable reaches of the Hudson River and all navigable tributaries thereto.

(c) on the east, the farthest reaches of the dumping grounds for dumped materials emanating from the Port of New York as well as all of the area west of a line drawn from Montauk Point, Long Island to Watch Hill, Rhode Island.

(d) on the west, all points on the New York State barge canal system and including ports on the Great Lakes reached through the canal system or St. Lawrence River.

2. Any regular coastwise run having as one of its terminal points a point in or north of Norfolk, Virginia.

(b) Nothing herein shall be construed to prevent a subsidiary or affiliate (of Respondent) existing as of the date of this Agreement from performing, pursuant to any collective bargaining agreements to which it is a party, the work customarily and traditionally performed by it.

That language was retained in the succeeding 1982–1985 and 1985–1988 agreements.

The Union's counsel had advised the Board's Regional Office, during its investigation of a case related to the instant case, that the foregoing language was the result of the strike in 1979 that had been ''largely over issues of work preservation.''

The phrase ''all licensed and unlicensed employees'' contained in the opening sentence of the clause quoted above referred to captains, engineers, deckhands, mates, and cooks employed by the Respondent.

The 1985–1988 agreement contained a number of provisions which the General Counsel asserts were unilaterally changed by the Respondent on its expiration. Those provisions are discussed separately below.

B. *The Negotiations for a Renewal Contract*

The agreement entered into in 1985 was due to expire on February 15, 1988. On January 7, 1988 (all dates hereafter are for 1988 unless stated otherwise), the Respondent gave the Union a comprehensive proposal for a renewal contract. Its proposal included the following language, as a replacement for the paragraph in the 1985–1988 contract quoted above:

> This Agreement applies only to all engineers utilities, deck engine utilities, and barge mates, employed on tugboats, and barges owned or operated by Spentonbush-Red Star Companies in the port of New York.
>
> (a) on the south, by the Verrazano Bridge.
>
> (b) on the north, by the George Washington Bridge.
>
> (c) on the east, by the Throgs Neck Bridge.
>
> (d) on the west, by New Jersey.
>
> This Agreement shall apply to employment on all equipment now covered by the Agreement and all equipment hereinafter acquired by the employer.

The reference to ''all engineer utilities, deck engine utilities and barge mates'' pertained to the classifications under the 1985–1988 contract of engineers, deckhands aboard the tugboats, and mates aboard the barges. By clear inference, the Respondent's proposal would exclude tugboat and barge captains, tugboat mates, and cooks; those classifications as noted above, were included in the unit description in the 1985–1988 agreement. In effect, the Respondent was proposing to exclude the captains (and apparently the tugboat mates) as supervisors and to eliminate the cook's position so that the crewmembers on the tugboats would have to buy and prepare their own meals.

The Respondent's proposal also sought substantial reductions in wages and benefits.

There were four negotiating sessions between the Union and the Respondent prior to the expiration of the 1985–1988 contract. During that same interval, the Union was conducting separate negotiations with a group of seven other employers who were engaged in the same type business as the Respondent.

The individuals negotiating for the Union were its president, Albert Cornette, its attorney, Seymour Waldman, its secretary-treasurer, Peter Gale, and its general organizer, James Morrissey. Negotiating for the Respondent was Hess' vice president for marine operations, John Gehegan, and its attorney, Martin Oppenheimer.

The first session was held on January 7. It was brief. The Union, on receiving the Respondent's contract proposals, rejected them summarily as ''drastic.'' It informed the Respondent that there would be a strike if agreement was not reached by February 15.

At the second session, held on January 29, the Union advised that any reduction in the manning of the crews would result in a strike. As to the Respondent's proposal to limit the geographical scope of the applicability of the contract, as set forth above in the quoted language of its proposal, the Union stated that if the Respondent got all its economic proposals there then would be no need for that ''scope'' language. Gehegan replied that that was ''correct.'' He added that if the Respondent got its economic points, it would be ''totally negotiable as far as scope was concerned,'' that it would be open ''to discuss scope.''

The third session took place on February 12. The Union tendered a package offer which, it represented, would provide for a 13-percent reduction in the Respondent's costs. It stated that its offer was made on the understanding that the contract changes contemplated there would be the only ones to be made. The Respondent advised the Union that it would review this proposal and cost it out. It also advised the Union that, in any event, it insisted on excluding the captains from the unit.

The fourth session was held on February 14. The Respondent agreed then that the mates on its tugboats would remain in the unit. It also increased its wage rate proposal

from that contained in its original proposal. The Union said that it might seek an extension of the contract. The meeting ended with the Respondent expecting that the Union would call it to schedule another meeting prior to the contract expiration date; the Union, for its part, awaited a call from the Respondent. Neither side called.

The Union struck on February 16, 1988. All but 11 of the approximate 170 individuals in the unit engaged in the strike.

The parties stipulated that, as of the date the strike began, the Respondent made the following changes:

1. The position of cook was eliminated.

2. Contributions to the insurance and pension fund set forth in the collective-bargaining agreements were suspended and employees were covered under (the Respondent's) health insurance, pension, and savings/stock bonus plans.

3. On crew change day, the man coming on was paid for the day.

4. Employees were reimbursed for transportation from the major airport nearest their home to the vessel and back to the same airport, provided the employee had worked a minimum of 30 days.

5. Crew changes took place at a minimum of 30-day intervals.

6. Manning on tugs consisted of one captain, one mate, one engineer utility worker, and one deck engine utility worker. Manning on barges consisted of one captain and one mate.

7. Job assignments were made on the basis of merit and ability.

8. Wages for the engineer utility workers ranged between $155 and $175 per day. Deck engine utility workers were paid $112 per day. Barge mates were paid between $125 and $145 per day.

9. Tug mates were paid on a salary basis with annual salaries ranging between $29,500 and $36,000 and were treated as supervisors with respect to attendance at management meetings and the like.

On March 2, the Respondent wrote the Union advising that it withdrew the proposals it made on February 14 and that it remains prepared to negotiate for a new contract.

On March 18, the Respondent and the Union met again. At this meeting, the Respondent alluded to the Union's proposal of February 12 and stated that that proposal offered only a 9-percent savings and not the 13-percent savings that the Union had claimed. No reference was made at this meeting to the geographic scope clause.

On April 29, the Respondent and the Union met for the last time. The Union presented another offer. The Respondent rejected it as still inadequate. No reference was made at that meeting to the geographic scope matter.

C. *The Geographic Scope Issue*

The General Counsel contends that the Respondent's proposal to change the language describing the area in which the contract is to be applicable is a permissive, not a mandatory, subject of bargaining. The General Counsel further contends that the Respondent unlawfully insisted on that proposal in its negotiations with the Union and unlawfully implemented it on the expiration of the 1985–1988 contract.

The Respondent asserts that its proposal was a mandatory bargaining subject in that it was aimed at getting an accord on the Respondent's right to subcontract unit work and as it was not aimed at changing the scope of the unit. The Respondent further asserts that it did not bargain to impasse thereon and that there is no evidence that it implemented this proposal.

Permissive subjects of bargaining are those not involving wages, hours of work, or other terms and conditions of employment of the employees in the bargaining unit. The subcontracting of work done by unit employees in a subject over which the parties must bargain; the removal of employees from the bargaining unit is a permissive subject. Compare *Western Publishing Co*., 269 NLRB 355 (1984), with *Newspaper Printing Corp*., 232 NLRB 291 (1977).

Recently, the Board observed that distinguishing between a proposal that would change the unit scope, i.e., a permissive bargaining subject, and one that would change the work to be assigned to unit employees, i.e., a mandatory subject, sometimes triggers a ''semantic debate.'' The Board then decided to abandon the attempt to draw such a distinction in favor of an approach which would accommodate both interests. See *Antelope Valley Press*, 311 NLRB 459 (1993). In that case, the Board stated that it would look at whether an employer insists on a change in the unit description. Bargaining to that end is unlawful. An employer may lawfully insist on an addition to the unit description that would grant it the right to transfer work out of the unit, provided that the union is not deprived of the right to contend that the employees performing the transferred work are to be included in the unit.

The Respondent's proposal obviously involves a change in the unit description, and not an addition thereto. In the 1979–1982 contract and subsequent contracts, subparagraph (b) in the unit description permitted the Respondent to continue to subcontract work but only to the extent that it had done so prior to 1979. If the Respondent were seeking in the 1988 renewal negotiations, as it contends it was, to expand its right to subcontract, it could have proposed an addition to subparagraph (b). Such a proposal would have been perfectly lawful under the rationale in *Antelope Valley Press*, supra.

The next issue to be considered is whether the Respondent had insisted on bargaining thereon. The principle governing this issue is clear. It is lawful to insist on matters within the scope of mandatory bargaining and unlawful to insist on matters without. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1957).

The Union had, at the first bargaining session in 1988, summarily rejected the totality of the Respondent's proposal. That proposal, on its face, reopened the unit scope controversy that had led to a 2-month strike in 1979; it would also reduce the unit complement by one-third and wages and benefits materially.

At the second session, the Respondent's vice president made it clear that its scope proposal would be negotiable, and possibly abandoned, if the Union met the Respondent's economic demands. In the remaining bargaining session, the Union presented economic concessions to the Respondent in an effort to satisfy its demands. At no time in those sessions did the Respondent indicate that its bargaining position had changed, vis-a-vis its scope proposal. I therefore find that the Respondent, throughout the bargaining, had insisted on its proposal to modify the unit description.

The Respondent seeks dismissal of this allegation on the ground that there is no evidence that it implemented its geo-

graphic scope proposal. The gravamen, however, of the alleged violation is, as found above, the insistence in bargaining on a permissive subject. In any event, the evidence, both as noted in sections above and as discussed in sections below, disclose such a pervasive abnegation of the 1985–1988 contract by the Respondent as to compel a finding that it, de facto, has indeed implemented, inter alia, its scope proposal. Virtually nothing has been left of that contract to be applied to the unit employees, whatever side of the waters under the George Washington bridge its vessels are moving.

I find that the Respondent, by having in essence demanded that the Union accede to its economic proposals before it would consider dropping its geographic scope proposal, has unlawfully insisted in bargaining on a permissive subject. See *Bremerton Sun Publishing*, 311 NLRB 467 (1993); *Greensboro Coca-Cola Bottling Co*., 311 NLRB 1022 (1993).

D. *Alleged Unlawful Withdrawal of Recognition*

The complaint alleges that, on and since February 16, 1988, the Respondent unlawfully withdrew recognition from the Union as the bargaining representative of the Respondent's tugboat captain and barge captains by insisting that they are supervisors. Initially, the Respondent contends that Section 10(b) of the Act bars litigation of this allegation.

The unfair labor practice charge filed by the Union in Case 2–CA–23282 on January 19, 1989 (i.e., a date more than 6 months after the date of the alleged violation), states as its basis, inter alia, that the Respondent withdrew recognition of the Union as the captains' representative. The initial charge in this proceeding was filed by the Union on August 3, 1988, in Case 2–CA–22970–2; it charged that the Respondent has unlawfully failed to bargain with the Union by having made unilateral changes in the terms and conditions of employment of the unit employees. It is undisputed that the Respondent has, since mid-February, insisted that its captains are supervisors as defined in the Act and that the Union thus cannot represent them.

The Board has traditionally held that a late charge may be timely filed if it is ''closely related'' to a timely filed charge. See *Redd-I, Inc*., 290 NLRB 1115 (1988). In that case, the Board stated:

> In applying the traditional ''closely related'' test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

The charges filed in Cases 2–CA–22970–2 and 2–CA–23282 involve substantially the same alleged conduct insofar as the captains are concerned, i.e., the changing of their employment status to supervisors and thereby removing them from the unit represented by the Union. They involve the same time period and the same object. Also, there is no basis to find that the Respondent was in any way prejudiced in litigating these allegation. Thus, the August 1988 charge and the January 1989 charge are closely related within the meaning of *Redd-I*, supra. In that regard, see *United States Can Co*., 305 NLRB 1127 (19892), and cases cited there. Accordingly, I find no merit to the Respondent's contention that this matter is time-barred.

The substance of the allegation is now considered and its merits turn on whether the captains are statutory supervisors.

As noted above, the Respondent had proposed in early 1988 that the renewal contract would apply only to all engineer utilities, deck engine utilities, and barge mates working on its vessels. Employees so to be classified were referred to respectively in the record as engineers, deckhands, and barge mates. In the 1985–1988 contract, the unit was comprised of employees in those classifications and also of the tugboat captains, the barge captains, and the tugboat mates. As earlier noted, the Respondent's proposal in 1988 would remove from the unit the latter three classifications. The complaint alleges, and the Respondent's answer admits, that since on about February 16, 1988, the Respondent withdrew recognition of the Union as the representative of the Respondent's tugboat captains and barge captains. As to the tugboat mates whom the Respondent's proposed contract would also exclude from the unit, on February 14 the Respondent had offered to agree that they would remain in the unit. It was, however, stipulated at the hearing that, as of February 16, the Respondent has treated its tugboat mates as supervisors. The evidence pertaining to the alleged supervisory status of the captains and, incidental thereto, of the tugboat mates is discussed next.

As of early 1988, there were 11 tugboats and 11 barges operated by the Respondent, each with 2 crews. Thus, the Respondent then had 22 tugboat captains, 22 barge captains, and 22 tugboat mates in a unit of about 176.

The barges are not self-propelled; they cost from $2 to $10 million each and are from 200 to 400 feet long and 40 to 75 feet wide. They can hold up to 110,000 barrels of gasoline or oil and are equipped with pumping and related machinery. The tugboats, which push or pull the barges, cost from $2 to $6 million each and are from 75 to 115 feet long and 24 to 34 feet wide.

The Respondent's office is in New York City. In 1988, Joseph Gehegan was the Respondent's vice president in overall charge of its operations. Reporting to him then was its general manager, Stanley Chelluck, who was responsible for day-to-day operations. Under Chelluck were an overall manager of operations, a barge operations manager, a tug operations manager, and a group of seven dispatchers. The Respondent, since prior to 1988, also had a facility in Brooklyn, New York. That facility has been supervised by the Respondent's manager of engineering and safety. Under him

were two port captains and three port engineers. The port captains and port engineers visit terminals to ensure that the Respondent's vessels are operating properly, safely, and in compliance with U.S. Coast Guard procedures.

As noted above, each of these vessels have two crews. In early 1988, one crew was aboard usually for a 2-week period; the second crew met the vessel at a terminal on its route and relieved the first crew for the next 2-week period. On a barge, a captain and a mate comprised one crew and they alternated 6-hour watches during their 2-week stint. A tugboat crew was comprised of a captain and a mate who alternated 6-hour watches, two deckhands who also alternated their 6-hour watches; an engineer who worked two 6-hour watches daily; and a cook whose hours are not contained in the record.

The composition of the respective crews were fairly stable over the years; their wages and other terms of employment were governed by the provisions of the collective-bargaining agreement between the Respondent and the Union. For example, hiring was done via the Union's referral hall; seniority regulated job transfers; captains received $5 a day more than mates.

The captain, or the mate, depending on which one was on watch, was in regular daily telephone contact with the dispatchers at the Respondent's office concerning destinations, shipboard needs, and related matters, referred to below.

The testimony offered by the parties respecting the status of the captains was, not infrequently, adduced by hypothetical questions and was conclusory. To put the evidence in proper perspective, a detailed review of the accounts given by the witnesses is necessary. Set out below are summaries of those accounts.

The General Counsel called four witnesses, named below. The respective accounts they gave respecting the duties of the captains as of early 1988 are contained under each of their names.

1. James Gillespie's account

He began working for the Respondent in 1971 as a chief engineer and was so employed as of February 15, 1988. He maintained the tugboat's diesel engines, and its electrical, pneumatic, and hydraulic systems. He dealt directly with a port engineer as to those matters, sending him the engineering logs he kept. The tugboat captain gave him no orders. Whenever he determined that overtime work was required, he performed it on his own initiative and later informed either the captain or the mate, whichever one was on watch, of his overtime hours, for transmission to a dispatcher in New York for pay purposes. He had never been told that the tugboat captain was his supervisor or that the captain had any authority to discharge or discipline a crewmember. In only 1987 and 1988 did the Respondent hold shoreside meetings for chief engineers and captains. For the most part, safety concerns were discussed at those two meetings. He observed over his 17 years in the Respondent's employ that an inexperienced deckhand was basically trained by the other deckhand. On one occasion in about 1972, he and other crewmembers had complained to the Respondent's office that their captain, who was a notoriously heavy drinker, had put their lives in danger. They were told to put their complaints in writing. They did so; their captain was discharged.

2. Daniel Blair's account

Blair worked for 7 years as tugboat mate for the Respondent before being promoted in 1978 to captain, a position he held until the strike in 1988, discussed below.

There was only one occasion when he expressed his view as to whether an individual should be hired. On that occasion, he and another captain were told that the Respondent was looking to hire a mate and they informed the Respondent that they knew of a mate who was out of work. The record does not disclose anything further as to that individual. Blair never prepared job evaluations for crewmembers.

On two occasions, Blair complained to the Respondent concerning deckhands working with him. One was aboard on a temporary basis. Blair complained that he was incompetent. The Respondent's personnel manager told Blair that he would have to put up with that deckhand as no replacement could be found. Blair complained also about another deckhand whom Blair believed ''was definitely on drugs.'' When his complaint to the Respondent's personnel manager proved fruitless, Blair prevailed on the deckhand to quit.

In about 1985, Blair told the Respondent's general manager, Chelluck, that his mate, Rowerick, was incompetent and should be let go. Chelluck told Blair that Rowerick had worked on bigger boats; Rowerick stayed on as mate until the strike in 1988.

On a third occasion, Blair called the Respondent's office to report that a deckhand, whenever he had a little too much to drink, wanted to beat the mate up. A couple of days later, the Respondent's personnel manager called Blair to inform him that that deckhand was being transferred to another tugboat.

Blair, as captain, had no authority over the engineer. As to the cook, Blair turned over to him the food money that was transmitted to him by the Respondent's office. The cook then purchased food and prepared the meals. The deckhand on duty, when he was on watch, performed routine painting and chipping work, in addition to handling towlines. Whenever the deckhand had to work with a heavy hawser, that deckhand would ''break out'' his counterpart who was off duty and together they would be able to work with the hawser. Similarly, the mate could ''break out'' the captain when he felt that ''another pair of eyes'' was needed on deck.

The captain signs the log in which entries are made by him and the mate. The captain also signs the timesheet that lists any overtime hours worked by members of the crew as a result of being ''broken out.'' He does the navigating of the tugboat, a function that Blair characterized as ''a rote type thing.'' When pulling or pushing a passenger ship, a harbor pilot aboard the ship instructed the captain or mate on the tugboat as to what to do. In the 1970's, no license was required to serve as a mate; one needed only ''to learn to steer.''

None of the crew called him ''captain.'' The crew, including the captain, has sat down with union representatives who came aboard to talk over any problems that they might have. Blair had attended meetings held once a year by the Respondent for captains and engineers and at which they were informed as to any changes in proceedings, e.g., changing a fuel supplier. Labor relations matters were not discussed at those meetings.

3. David Haggert's account

In 1972, he began work for the Respondent as a deckhand. In 1980, he was promoted to a mate's position; in 1985, to captain. A dispatcher told him, on his promotion to captain, that he had been recommended by a captain and a former captain.

When he first began working for the Respondent, he and other crewmembers wrote to the Respondent's office to report that the captain of their tugboat was jeopardizing lives because he was intoxicated. The record is silent as to what, if any, action was taken by the Respondent respecting that report.

On one occasion in about 1986, he recommended that a deckhand, sent from the Union's referral hall, be hired. He did this by telling ''the office that this deckhand . . . was doing his job the way it should be done.'' The record is silent as to whether that deckhand was retained in the Respondent's employ.

An experienced deckhand does not have to be told which cleat on a barge is the one to which a line is to be placed on as the procedure is standardized. It takes a good deckhand a couple of years to learn his job as he is always learning.

Haggert felt that he was responsible for overseeing ''everything that is going on with the boat'' but noted too that everything he did, the mate did. Haggert acknowledged that he had the authority to take the wheel away from the mate if he thought it was necessary. The record does not disclose the basis for this statement or that he ever did relieve the mate of the wheel.

4. Raymond Schaeffer's account

Schaeffer was hired by the Respondent 20 years ago. He began as a barge mate and has been a barge captain for the last 18 years. His prehearing affidavit notes that he was told once, by someone whom he does not recall and whom he thinks was not one of the Respondent's managers, that if he was unhappy with his mate, he could fire him. As captain, he signs the logbook and payroll sheets and forwards overtime pay requests to the Respondent's office for review. He and the barge mate handle lines; they also paint and clean the barge. The Respondent's general manager has inspected his barge and told him what things had to be done. In 1985, Schaeffer was sent a letter that was critical of the barge's condition. He wrote the Respondent's general manager to protest that ''the vessel was in a satisfactory manner prior to assuming responsibility for the vessel.'' Schaeffer felt ambivalent as to whether he was in charge of the barge as he took his orders from a dispatcher.

The General Counsel placed in evidence various memoranda signed by the Respondent's officials. One, dated December 29, 1981, was addressed to all captains under the subject, overtime. This memorandum spelled out in detail the circumstances in which the Respondent will pay for overtime. For example it states that ''if a deckhand is broken out and a man is required to ride the barge, the deckhand who is broken out and is [thus] on overtime will ride the barge.'' The record indicates that a deckhand on watch who ''rides a barge'' could claim overtime while on the barge; the foregoing directive apparently was aimed as stopping such a practice.

On August 19, 1981, the then newly hired marine superintendent, Chelluck, sent all captains and chief engineers a detailed memorandum on the subject, operating procedures. It states in general their responsibilities, e.g., maintaining the appearance and upkeep of the vessel. It also notes that port engineers will be visiting each vessel frequently to handle problems and to ''minimize the opportunity for disparities in performance'' among the two crews aboard. The memorandum informed the captains and engineers of the detailed responsibilities of the port engineers and provided each of them with a lengthy checklist to be filled out and submitted to the respective port engineer assigned to their vessel.

On August 4, 1987, Chelluck wrote to a barge captain and a barge mate to criticize them about the loading sequence used that commingled products and warned them that ''any repeat of a similar disaster will be dealt with proportionate disciplinary action.''

On January 9, 1986, Chelluck wrote ''All Hands'' aboard a barge to instruct them to cooperate with all terminal personnel and to direct them in specific areas as to how lines are to be handled and hoses rigged. They were told to call a port captain if they had any questions.

The Respondent called five witnesses whose respective accounts follow:

5. Paul Allen's account

Allen has been a tugboat captain in the Respondent's employ since 1977.

A typical voyage for his vessel began in the Port of New York, proceeded through the Long Island Sound to a destination in Massachusetts. When severe weather was encountered, the tugboat was put at anchor in one of several bays on that route.

As captain, Allen is responsible for the safety and welfare of his crew. In that regard, he can take the wheel from his mate in a storm.

Prior to February 16, he had not been told by the Respondent as to what authority he had as captain. Rather, he understood from his work experience what his authority was.

He had been asked by the Respondent to give oral evaluations as to the job performances of crewmembers. His recommendations as to whether a crewmember should or should not be retained in the Respondent's employ were followed about 50 percent of the time.

On one occasion a cook on his tugboat had been drinking and had to be carried by two crewmembers. Allen had him discharged. The record contains no details as to how that cook's discharge was effected. On another occasion, his recommendation that an engineer be transferred from his tugboat was honored.

His tug does ''ship work'' and it also moves barges. In doing ''ship work,'' he follows the directions given by the harbor pilot who is aboard the ship being moved by his tugboat. His tugboat pulls or pushes barges. He instructs deckhands unfamiliar with the procedures in moving barges as to their duties. When they became familiar with the process, they would do it routinely.

When Allen was assigned to a different tugboat, he asked that the members of the crew he had worked with also be assigned to that boat and they were.

Allen assigned deckhands to painting and chipping work. The collective-bargaining agreement between the Respondent and that Union specified the hours during which this work was to be done. Allen could ''break out'' the cook to paint his galley; the cook spent about 18 hours a year on that task.

Allen has no recollection of having seen, prior to 1988, a copy of a manual of operating procedures issued by the Respondent.

6. William Serba's account

Serba has worked for the Respondent since 1962, progressing in that period from deckhand to tugboat captain. His tugboats have gone as far, from the New York harbor, as Boston and the Great Lakes. His responsibilities are to oversee the crew, to account for expense moneys, to ensure that the vessel is properly stored and that it is safely navigated. He can refuse an assignment if weather conditions are not right, but has no specific recollection of ever having done so.

On two occasions, the Respondent's general manager asked him for his opinion as to individuals who were being considered for promotion to captain. The individuals he named were promoted. Serba could not recall the details as to how one of those individuals was promoted. The comments he gave respecting that individual were based on that person's reputation and on those occasions when Serba observed him while he was working on a vessel which was not captained by Serba. As to the other individual, Serba was asked for his ''input'' and he advised the Respondent that the individual ''could handle the job.''

On two occasions, crewmembers on his tugboat were terminated. One, a cook who was under the influence of liquor, was discharged at the end of the voyage. The second, a mate, had grounded the tugboat while on watch. Serba gave conflicting accounts as to what he reported to Respondent as to that mate's qualifications.

Serba assigned painting and chipping duties to the deckhands.

At one time, the cook aboard his tugboat had a grievance. Serba was not involved in adjusting that grievance.

7. Colby Hoyt

Hoyt has been a barge captain in the Respondent's employ for the last 10 years. Previously, he had been a mate for over 2 years.

His barge contains tanks, pump engines, locker systems, lines, a windless, and living quarters. It is 328 feet by 61 feet and can carry 65,000 barrels of oil.

Hoyt maintained a logbook, kept overtime records, had to ensure that the barge was kept on an even keel during loading and unloading and performed painting and chipping work along with the mate. Hoyt also trained newly hired barge mates.

In 1977 (apparently at a time when he may not have been in the Respondent's employ), a mate who had been drinking disappeared for a couple of days. That individual later left the barge during the course of a voyage. Hoyt told personnel that he did not want to work with that individual. Hoyt never saw that man again.

Another mate, who had been on the job for only 1-1/2 weeks had opened the wrong valve, causing a spillage. Hoyt requested that that mate not be sent back to his barge. Hoyt never saw him again.

Hoyt had ''suggested'' to the Respondent that another mate was not very competent but that individual stayed on the barge.

The Respondent's manual of operating procedures refers to the captain of a barge as ''Master.'' Hoyt had not familiarized himself with that manual.

A port captain examined his barge at periods varying from four to five times a week to, at times, only once a month.

It is the Respondent's policy to investigate any complaint made by a captain to determine if it has merit, before any crewmember is discharged.

8. Stanley Chelluck's account

Chelluck started working for the Respondent in 1981. He began as its marine superintendent and became its general manager in about 1985. As marine superintendent, he was responsible for the maintenance and repair of the Respondent's vessels. As general manager, he has taken on various administrative duties.

Respecting the Respondent's hiring process, Chelluck related that when boat personnel were referred from the Union's hall, he would check with ''senior tug people'' on barge captains ''to see if they knew'' the individuals referred.

Captains had ''full authority in [terminating employees] certainly within the guidelines of company policy.''

When requests for overtime pay were received, questions thereon were directed by Chelluck to the captains. The Respondent's guidelines govern overtime pay. As to employee evaluations, the captains' input was sought.

Chelluck recalled an instance where a captain fired an employee who then complained to Chelluck. Chelluck investigated the complaint. As a result, the employee was reinstated; the captain quit.

Chelluck has instructed the operations managers to check with crewmembers whenever any captain reports that he has a problem with a crewmember.

In 1986, Chelluck had been informed that the crew on one barge had been uncooperative. He sent a memoranda addressed to ''All Hands'' on that barge respecting that matter. He gave directions as to how they are to deal with suppliers and customers, how lines are to be received and when they are to be slacked off and when they are to be doubled, and how the cargo hose boom is to be rigged. They were instructed to let their port captain know if they have any ''difficulty in accommodating [these] procedures.''

Respecting the Respondent's policy as to alcohol or drug use, everyone on board has an obligation to notify the Respondent's office of any violation.

9. Joseph Gehegan's account

In 1988, he was the Respondent's vice president for marine operations. He made the final decisions as to promotions and transfers of crewmembers and did so based on his own observations and on the views he solicited from managers and captains. He transferred Captain Edward Kessler to a larger vessel after giving ''strong weight'' to recommendations he received from Captain Serba and ''one or two other masters.'' Gehegan does not know if Kessler ever had worked with Serba. Gehegan also was familiar with Kessler as he had checked out the equipment on his boat, and as he

had ''talked to the people'' and had examined records in order to get an understanding of Kessler's abilities.

Gehegan had similarly transferred Captain Wills when Captains Serba and Kessler recommended him. Gehegan could not recall the details as to those recommendations. The Respondent's ''operation people'' were also familiar with Wills' qualifications.

Gehegan did not promote a barge mate after Captain Clebolt, Captain Olson, and Port Captain Dewer indicated that that mate had a problem with alcohol.

In 1980, 1981, and 1982, he held meetings with the captains to inform them of the Respondent's operations, to discuss safety issues, and to ''reinforce'' the idea that they were the Respondent's ''managers afloat.''

In January 1988, Gehegan wrote to the captains to inform them that they were the Respondent's ''managers afloat.''

In January 1988, Gehegan wrote to the captains to inform them they could choose to ''[come] ashore as part of . . . management and having no union representation'' and to advise them that the Respondent's structure at that time did not permit its supervisory personnel to act as front line management.''

The Respondent's personnel manager developed information on any situation which might involve an adverse decision concerning a crewmember. Chelluck and Gehegan reviewed that information before making a decision on that matter.

The Respondent's office reviews overtime vouchers approved by captains to ensure that they meet the guidelines set up by Gehegan in a December 1981 memorandum. Those guidelines specify which deckhand is to ''ride the barge''; they require that timecards which contain overtime hours must state the specific work done during those overtime hours; and they provide that overtime for maintenance and repair work in excess of 12 hours must first be cleared with the marine superintendent.

The Respondent placed in evidence documents from which the following excerpts have been extracted.

1. Written evaluations prepared by 14 of the captains in 1979 and 1980.

2. Respondent's operations manuals for its personnel that state:

> (a) that the captain has absolute command of the vessel and has full authority over all phases of its operation at all times, both in port and at sea.
>
> (b) that the captain shall take prompt steps to adjust equitably complaints from ship's personnel and that suitable procedures . . . in accordance with . . . collective-bargaining agreements, shall be followed as far as practicable.
>
> (c) that captains are the direct representatives of the Respondent.

3. Cover sheets of the personnel folders of 16 crewmembers that reflect their employment status. Chelluck had identified these folders but had no recollection as to the notations. The folders contained comments such as ''Chris Weiss highly recommends him'' and handwritten notes, such as a letter from a captain complaining about two crewmembers.

4. Ten more cover sheets, with notations that most of these crewmembers were discharged by captains for drinking alcohol or refusing to work. Chelluck also had no recollection as to the circumstances alluded to on those cover sheets. He stated that certain notes reflect that he made his own independent investigation.

5. A June 6, 1982 memorandum by Gehegan to all captains directing them to post it in the galley for all hands to read and advising that any member on board who is under the influence of drugs or alcohol will be terminated and that the captain is responsible for enforcing this policy.

6. A memorandum to captains and engineers designed to define their respective functions, inasmuch as they involve ''a very sensitive subject especially in dealing with two men in the same union, with the same pay . . . .'' They were informed that port engineers were assigned specific vessels that they will visit frequently to handle problems.

10. Analysis

The Respondent, as the party asserting that the captains are supervisors not protected by the Act, bears the burden of proving that they are supervisors. *Health Care & Retirement Corp*., 306 NLRB 63 fn. 1 (1992).

The Respondent and the General Counsel have pointed to various nonstatutory factors that pertain to the status of the captains. The Respondent, on the one hand, offered evidence that its barges and tugboats were very expensive to build, are large and complex, and require skillful handling to avoid serious environmental damage resulting from an oil spillage. Those considerations appeared to be significant in a decision finding that captains were supervisors; the Board adopted it, relying, however, on findings as to certain of the statutory criteria in Section 2(11) of the Act. See *Sun Refining & Marketing Co*., 301 NLRB 642 fn. 2 (1991). The General Counsel, on the other hand, has alluded to the abnormally low ratio of supervisors to barge mates, should the barge captains be supervisors. The barge captains, port captains, port engineers, and others would readily outnumber the barge mates. The supervisory-employee ratio would be a little different for the tugboat captains. While a tugboat captain is on his 6-hour watch, there is but one deckhand on that same watch; the cook and the engineer work for the most part on their own while the mate and the other deckhand are off-duty except for an occasional breakout. The Board, however, has observed that the supervisor-employee ratio may be a useful indication but it is not a definitive factor. See *Phelps Community Center*, 295 NLRB 486, 492 fn. 16 (1989).

Again, the Respondent showed that its vessels sail long distances from their home port. In *Mon River Towing*, 173 NLRB 1452, 1455 (1969), then Trial Examiner Klein stated, in finding a boat captain to be a supervisor, that it is inconceivable that employees on an around-the-clock operation for several days or even weeks at a time would be left without present supervision. The General Counsel's brief suggests that none of the Respondent's crew is left without supervision at any time in view of the regular communications that the captains and mates have with the office, a factor noted in *McAllister Bros*., 278 NLRB 601 fn. 3 (1986). Obviously, if distance were controlling, the status of the captains need not have been litigated but would have been disposed of summarily. The Respondent also relies on the testimony that its captains are responsible for the safety of the vessels. That does not confer supervisory status on them. See *Graham Transportation Co*., 124 NLRB 960, 962 (1959). There were other secondary factors in the record as to the

captains' status, e.g., nomenclature, the crews' perception of the captains, comparison of their functions with others, the bargaining history, and pay differentials. Suffice it to state that, while all the secondary indicia lend color, the evidence respecting the statutory criteria is paramount.

For that matter, analogies to prior cases involving similar issues, while helpful, are not dispositive. In *A. L. Mechling Barge Lines*, 197 NLRB 592 (1972), captains of tugboats operating on inland waterways, each with a crew of three deckhands, were found to be supervisors. Compare that case with *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993), in which the Board noted that, in a prior representation case, it had found that captains of a six-man crew on ferryboats operating in Long Island Sound, each with 1000 passengers aboard, were employees. See also *NLRB v. Bilker Towing Co.*, 284 F.2d 118 (5th Cir. 1960), in which the court deferred to the Board's exclusion of six tugboat captains from the unit found appropriate in that case; the court also stated, ''clearly, the Board here might properly have included these captains . . . but [the court refrained] from interfering with the Board's determination that the unit without the captains is an appropriate unit.''

Recently, the Board reviewed in depth the precedential background of Section 2(11) of the Act. Its determination as to the status of certain charge nurses in that case was based on a detailed review of the evidence relating to specific statutory indicia. See *Mortuaries Nursing Home*, 313 NLRB 491 (1993). That is the approach used below.

Section 2(11) of the Act sets forth the statutory definition of supervisor by enumerating certain authorities in the disjunctive as follows:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The collective-bargaining agreement between the Union and the Respondent circumscribed many of those functions, insofar as they pertained to the captains. The agreement provided that crewmembers shall be hired via referral from the Union; transfers and layoffs were governed by seniority; disciplinary measures were spelled out as were relevant grievance procedures; and job assignments were specified in many aspects.

The basic issue is whether the Respondent has proved that its barge captains and its tugboat captains had the authority to effectively recommend the hire or the transfer or the suspension, etc., of employees or that they had the authority to responsibly direct them. The Respondent must show that any such authority required the use of independent judgment and was not a routine matter.

The testimony of the Respondent's witnesses, Gehegan and Chelluck, indicates that they conduct independent examination of all complaints they received from captains or other crewmembers before they took any action that may be adverse or to any crewmember, whether it be to discharge, transfer, suspend, layoff, or otherwise discipline. Similarly, while Gehegan sought out the advice of some of senior tugboat captains when he considered promotions to better positions or transfers to larger vessels, he took their advice in context with his own observations, and those by port captains and other supervisory personnel. The testimony of another of the Respondent's witnesses, Tugboat Captain Allen, is that his recommendations were followed 50 percent of the time. The General Counsel's witnesses offered testimony to the same effect. It is clear, from the foregoing, that the recommendations made by the captains had been independently examined by their supervisors and thus cannot be said to have been effective recommendations as contemplated by Section 2(11) of the Act. See *Scranton Tribune*, 294 NLRB 692 (1989). For the same reason, I attach no probative weight to the many and varied conclusory materials proffered by the Respondent, including personnel folder notations, otherwise unsupported, that some captains had disciplined crewmembers or recommended discipline, and including operation manual provisions, which apparently went unread and which stated that its tugboat captains had full responsibility over the other crewmembers. I find that the Respondent has not met its burden of proving that the tugboat captains, or the barge captains for that matter, possessed the authority, prior to the 1988 strike, to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or to adjust their grievances or effectively to recommend any such actions.

As the 2(11) criteria are written in the disjunctive, there remains for consideration the issue as to whether the captains possessed the authority, in the interest of the Respondent, to responsibly direct employees, provided that the exercise of such authority is not of a routine nature but requires the use of independent judgment. The duties they exercise, while many serve the employees' interests in having a safe, clean vessel, clearly are performed in the Respondent's interests. Cf. *Olin Masonic Home*, 295 NLRB 390, 395 (1989). The issue turns rather on whether directions given to the crew are more than routine in nature.

It appears that the tugboat captains may not even articulate directions to the mates. The mates routinely steer the vessels along established routes. Thus, as one captain described it, his vessel goes up on one side of the Long Island Sound and returns via the other side. The mate routinely maintains the vessel's log while on watch. The painting and chipping work by the deckhands has been described as but involving their starting at the top and working their way downwards. The persuasive evidence is that these deckhands, after initial on-the-job training by experienced deckhands and other crewmembers, perform their work in accordance with procedures long in existence. A deckhand's handling of hawsers and the need to break out the second deckhand to assist them are standardized functions; assignments to painting and chipping work are in relevant part controlled by provisions in the collective-bargaining agreement and are ongoing duties performed respectively by the deckhands; overtime work has been defined very precisely to the crews by the Respondent and timecards submitted by captains for approval thereof are closely scrutinized; the securing of lines to cleats on the barges obviously cannot be done haphazardly without risk but experienced deckhands secure those lines on a regular, recurring basis, according to the credited accounts of General

Counsel's witnesses, which at least one of the captains, who testified for the Respondent, has corroborated. The Respondent has shown that the tugboat captains, in handling the wheel, possess and exercise a considerable level of skills. The exercise of those skills in performing their own job is not what is contemplated by the Act insofar as the issue of supervisory status is concerned. More must be shown than that the captains were skilled workers directing helpers. See *Soil Engineering & Exploration Co.*, 269 NLRB 55 (1984). More importantly, a tugboat captain's laying out the route on which the vessel is to be steered by himself and the mate, while on their respective watches, is based on his skills and experience. It does not involve the exercise of independent judgment in assigning work among employees as contemplated by Section 2(11) of the Act and thus is not an indicium of supervisory authority. Cf. *Beverly Enterprises*, supra at 4. Further, the mate on one of the Respondent's tugboats is the only crewmember aboard who can relieve a captain at the wheel. Clearly then, the selection of the route to be followed does not call for the use of any discretion in assigning work among unit employees. In that regard, cf. *Delta Mills*, 287 NLRB 367, 371 (1987).

Some of the Respondent's own actions demonstrate that it itself had an ambivalent view as to whether its captains were supervisors, e.g., its long-term recognition of them as unit employe. Gehegan's January letter to the captains that they were not then ''front line management,'' its stated willingness to consider waiving its demand to change the description of the unit (which, inter alia, excluded the captains and mates) if the Union met its economic demands, and its later concession as to the mates while pressing these economic demands. Further, the Respondent had never told the captains prior to the 1988 strike that they were supervisors whereas, after the strike began, it did so and provided them with training as supervisors.

The evidence, as recounted by both the General Counsel's and the Respondent's witnesses, demonstrates that the Respondent has failed to meet its burden of proving that the tugboat captains or the barge captains responsibly direct the other crewmembers.

To summarize, while there are considerations that strongly suggest supervisory status—the traditions of the sea whereby captains are viewed as masters of their vessels when on voyage, the size and cost of the tugboats each with a crew of six, the nature of the cargo, which must be protected against an environmentally damaging spillage, and the long distances traversed—and while there are countervailing considerations, the evaluation of the factors directly bearing as to the essential issue, the nature of the authority possessed by the captains in the Respondent's interest as to the exercise of the indicia set out in Section 2(11) of the Act demonstrates that the Respondent has not met its burden of proving that these captains were supervisors.

The complaint alleges that the Respondent withdrew recognition from the Union as the captains' bargaining representative not only in violation of its duty to bargain collectively but also in order to discourage unit employees from supporting the Union. A failure to bargain in good faith does not, by itself, establish the animus essential to prove unlawful discrimination. See *Outboard Marine Corp.*, 307 NLRB 1333, 1337 (1992). A failure to bargain collectively, however, may also constitute a violation of Section 8(a)(3) when supported by independent evidence. *Venture Packaging*, 294 NLRB 544, 550–556 (1989). In the instant case, the Respondent, in January, asked its captains to become part of management and to give up the Union. On February 15, it purported to make that choice for them. There was no showing of any changed circumstances there which could explain its action, other than a wish to undermine the unit employees' support of the Union. If the Respondent genuinely felt that it was desirable to clarify the captains' status, it could have had recourse to the Board's unit clarification procedures. Instead, by its preemptive conduct, it forced its employees to choose either to abandon a significant part of the unit complement or to strike. It takes no sophisticate to realize the element of risk the employees faced in such a strike—were the captains found to be supervisors, a strike to compel their inclusion in the unit might well be unprotected and the jobs of the strikers forfeit. The solicitation of the captains by the Respondent to join management, the Respondent's later unilateral decision to absorb the captains into its management structure, the absence of any compelling reason why the Respondent acted then after so many years of peaceful negotiations respecting the captains' unit placement, and the finding below as to the Respondent's failure to reinstate the striking employees all warrant a clear inference that the Respondent's withdrawal of recognition was motivated in part by a desire to weaken its employees as to their supporting the Union. There is no evidence in the record which would rebut that inference. In these circumstances, I find that the Respondent's withdrawal of recognition was not only in derogation of its duty to bargain collectively with the Union but also was violative of Section 8(a)(3) of the Act.

E. *The Strike-Changes in Wages and Working Conditions*

On February 15, the Union held a meeting, attended by about 2000 of its members, for a strike vote against the Respondent and other companies engaged in the same type business and with whom the Union had contracts which expired that same date. At the meeting, the Union's president discussed the proposals that had been made by the Respondent and other companies. In particular, he referred to the clause, discussed above, which changed the description of the unit. He stated that, under that clause, employees on a vessel that goes beyond the George Washington bridge may no longer be covered by a collective-bargaining agreement. He spoke also of the reductions in manning the vessels and the various economic proposals made by the Respondent and the other employees. The Union's secretary-treasurer spoke next. He noted that the Union had struck in 1979 for 60 days to obtain the language describing the unit as it appeared in contracts signed since then. The members voted unanimously to strike. It began on February 16. Of the approximately 176 employees in the Respondent's employ then, all but 11 struck.

The captains who continued to work for the Respondent on and since February 16 were told by the Respondent that they were now part of management and they were required to attend supervisory training courses. The Respondent also put into effect the changes as noted above, e.g., the cook's position was eliminated, tugboat mates were treated as supervisors, and new benefit plans were substituted. As these

changes were made after the Respondent had unlawfully insisted on changing the description of the bargaining unit and after having withdrawn recognition from the Union as the bargaining representative of its captains who were employees under the Act, I find that the implementation of those changes by the Respondent as of February 16 was in derogation of its duty to bargain collectively with the Union. See *Bradford Coca-Cola Bottling Co*., 307 NLRB 647 (1992). I further find that the strike against the Respondent was caused and prolonged by the foregoing unfair labor practices.

F. *The Offer to Return to Work*

On September 2, the Union wrote the Respondent as follows:

> By this letter [the Union] makes an unconditional offer, on behalf of all members of the bargaining units covered by the expired collective-bargaining agreements, to return to work under the terms and conditions that existed under the expired collective bargaining agreement. As you know, [the Union] believes that, as a result of your unfair labor practices, any changes in the terms and conditions that existed under the expired agreements are unlawful. Please contact us immediately to arrange for an orderly return to work.

On September 8, the Respondent's counsel replied as follows:

> We write on behalf of [the Respondent] in response to your letter dated September 2, 1988. [The Union's] offer, on behalf of its members, to return to work under the terms that existed in the expired collective-bargaining agreement is not acceptable in light of the fact that the [Respondent] has changed the wage rates for its employees following your union's strike and the bargaining impasse over the new contract's economic terms.

On September 20, the Union wrote the Respondent as follows:

> This is in response to your letter dated September 8, 1988. The offers of reinstatement contained in our September 2, 1988 letter are unconditional under the applicable law. That we expect the employees to return under the terms and conditions of the expired agreements merely states the obligation of the [Respondent] to return the employees to work under the terms and conditions of employment that would have existed but for the employers' unlawful conduct; in this case, the terms and conditions that existed before the expiration of the contracts.

On September 28, the Respondent answered that letter, as follows:

> [The Union's] offer, on behalf of its members, to return to work continues to be conditioned on the [Respondent] changing existing terms and conditions of employment. The [Respondent] has not engaged in any unlawful conduct and, therefore, your conditional offer to return to work is not acceptable.

In the exchange of the letters set out above, the Union had offered, on behalf of the striking employees to return to work under the conditions as they were just prior to the start of the strike. The Respondent rejected the offer as a conditional one and contends that the offer thereby did not obligate the Respondent to reinstate any of its striking employees.

The Board, however, has ordered an employer to offer reinstatement to unfair labor practice strikers who have been denied reinstatement as a consequence of its failure to reinstate them to their former or substantially equivalent jobs, without prejudice to their seniority or other rights. See *Waterbury Hospital*, 300 NLRB 992, 1011 (1990), enfd. 950 F.2d 849 (2d Cir. 1991). In essence, the Respondent itself had unlawfully conditioned the reinstatement of the strikers to their accepting the terms and conditions it itself had unlawfully imposed. In so doing, the Respondent effectively had constructively discharged the striking employees. Cf. *Control Services*, 303 NLRB 481, 485 (1991). The Respondent's contention would have merit if the striking employees had sought redress of an unfair labor practice other than one which materially changed their own conditions of employment from those that existed when the strike began. This principle was established in the earliest days of the Board, as well as the very one controlling the issue in this case. Thus, an employer need not honor a request by strikers to be reinstated where they condition this request on his employer's reinstating an unlawfully discharged employee or who are unwilling to return to work under conditions existing at the time the strike was called. *Fansteel Metallurgical Corp*., 5 NLRB 930 (1938). Where an employer required striking employees to accept unlawful conditions it imposed, however, it thereby has treated them as discharged employees. See *American Mfg. Co*., 5 NLRB 443, 467 (1938). In a more recent case, *Honda of Hayward*, 307 NLRB 340 (1992), the Board ordered the employer there to rescind unilateral working conditions and to offer jobs to applicants who had been unlawfully denied employment. This is the course that the Respondent should have followed, rather than require its captains and tugboat mates to be unrepresented, rather than have its engineers come back as deckhands and perhaps its cooks as well, and rather than require the striking employees to accept the other changes it had unilaterally imposed.

I therefore find that the Respondent, since September 2, has unlawfully failed and refused to reinstate the approximately 165 of its employees who were engaged in an unfair labor practice strike and for whom the Union had unconditionally requested their reinstatement to their former jobs.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. At all times material, the Union has been the exclusive collective-bargaining representative of all employees of the Respondent referred to in the unit as described in the 1985–1988 collective-bargaining agreement between the Respondent and the Union, including tugboat captains, barge captains, tugboat mates, barge mates, deckhands, engineers, and cooks.
4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act as

it failed to bargain collectively with the Union respecting the employees in the unit described above by having insisted on changing the description of that unit, by having withdrawn recognition from the Union as the collective-bargaining representative of its captains and by having unilaterally imposed on the employees in the unit described above changes in their wages, hours of work, and other terms and conditions of their employment.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by having withdrawn recognition from the Union as bargaining representative of its captains in order to discourage crewmembers from supporting the Union, and by having failed to honor the unconditional offer made on behalf of its employees, engaged in an unfair labor practice strike, for reinstatement to their positions of employment as they existed when the strike began.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to restore and to maintain and give full effect to the terms and conditions of the 1985–1988 agreement until a new agreement is reached or until a lawful bargaining impasse exists. I shall recommend that the Respondent offer each of its employees, for whom the Union sought reinstatement on September 2, 1988, immediate and full reinstatement to their former positions of employment or, if for lawful reasons those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights, privileges and benefits previously enjoyed, displacing if necessary any employees hired as replacements for them. I shall also recommend that the Respondent make whole these employees for any losses in wages and benefits that they incurred by reason of the Respondent's failure to honor the request to reinstate them to their former positions of employment, to be calculated in accordance with the formula set out in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall be ordered to make payments on behalf of these employees, as of and since the date they had offered and been denied reinstatement, to the various trust funds established by the terms of the 1985–1988 agreement, the amount of any interest thereon to be determined in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In making these employees whole, with interest, respecting their lost benefits, the reimbursement shall include, among any other losses, medical and dental bills they have paid to health care providers that the contractual policies would have covered, for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of the Respondent's required contributions, and for contributions they themselves may have made for the maintenance of the contractual trust funds after the Respondent unlawfully discontinued or failed to make contributions to those funds. *Kraft Plumbing Co*., 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Reimbursement shall be with interest in the manner prescribed in *New Horizons*, supra. The Respondent shall also be required to reimburse the Union for any dues which, pursuant to dues-checkoff authorizations, they failed to deduct or would have been required to deduct from those employees' paychecks and to transmit those moneys to the Union as required by contract, insofar as the Union has not obtained such dues directly from employees, with interest under *New Horizons*, supra.

[Recommended Order omitted from publication.]